GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal No. 16791 of Southeast Citizens for Smart Development, Inc., and ANC 6B, pursuant to 11 DCMR §§ 3100 and 3101, from the administrative decision of Michael D. Johnson, Zoning Administrator, allowing the location of Father Flanagan's Boys Town Phase I (a residential group home) in a C-2-B District at premises 1308, 1310, 1312, and 1314 Potomac Avenue, S.E. (Square 1045, Lots 134, 136, 137, and 138).

HEARING DATES: December 4, 2001; February 5, 2002; February 12, 2002; February 19, 2002; February 26, 2002

DECISION DATE: May 7, 2002

DECISION AND ORDER

Southeast Citizens for Smart Development, Inc. (SCSD), filed an appeal with the Board of Zoning Adjustment on September 12, 2001, challenging the decision of the Zoning Administrator to approve the issuance of four building permits to Father Flanagan's Girls and Boys Town of Washington, Inc. (Girls and Boys Town),[1] permitting, as a matter of right, the construction and use of four youth residential care home buildings, each on an adjacent lot of record and each housing six youth residents and two resident supervisors. SCSD asserts that the four buildings are, for all practical purposes, a single community-based residential facility housing 24 youths that requires special exception approval. SCSD is a nonprofit corporation organized to facilitate community involvement and education in planning Ward 6 neighborhood development. SCSD is comprised of and represents various residents within the immediate area of the development. Exs. 2, 24.

On October 4, 2001, the Executive Committee of Advisory Neighborhood Commission (ANC) 6B, the ANC for the area within which the property that is the subject of the appeal is located, advised the Board that it had determined to join in the appeal. Ex. 23. The full ANC voted to join the appeal on October 9, 2001. ANC Commissioners Kenan P. Jarboe (Chairman) and Ann Black (Chair, Planning and Zoning Committee) and ANC Executive Secretary Calvin Gilbert are authorized to represent the ANC in the appeal. Ex. 28.

Unless otherwise noted, the term "Appellants" in this Decision and Order refers to both SCSD and ANC 6B. The Appellants are represented in these proceedings by attorney Andrea C. Ferster.

[1] At the time the appeal was filed, the property owner was named Father Flanagan's Boys Home of Washington, Inc. It subsequently changed its name to Father Flanagan's Girls and Boys Town of Washington, Inc.

Assistant Corporation Counsel Marie Claire Brown appeared on behalf of the Appellee, the Zoning Administrator.

The property owner, Girls and Boys Town, is represented by Phil T. Feola and Martin P. Sullivan of ShawPittman. Girls and Boys Town is a nonprofit, nonsectarian organization serving children ages of 2 to 18 years old.

After a public hearing, the Board determined that the Zoning Administrator erred in approving the four building permits as a matter of right, since the use of the property constitutes a single community-based residential facility, a youth residential care home for 24 children, that requires special exception review and approval.

PRELIMINARY AND PROCEDURAL MATTERS

Notice of Appeal and Notice of Public Hearing. By memoranda dated September 19, 2001, the Office of Zoning advised the Zoning Administrator; the Office of the Corporation Counsel; ShawPittman, counsel for Girls and Boys Town; ANC 6B; the ANC Commissioner for the affected Single-Member District; the Ward 6 Councilmember; and the D.C. Office of Planning of the filing of the appeal.

The Board scheduled a public hearing on the appeal for December 4, 2001. Pursuant to 11 DCMR § 3113.14, the Office of Zoning on October 18 and 19, 2001, mailed SCSD, the Zoning Administrator, and ANC 6B notice of hearing. Girls and Boys Town was copied with the Zoning Administrator's notice. Notice of the hearing was also published in the *D.C. Register* on several dates, beginning on October 19, 2001, at 48 DCR 9626, 9801, and 10,035 (2001). On December 4, the Board continued the hearing to February 5, 2002. The Board announced the continuation at the December 4 hearing, and notice of the continuation was also published in the *D.C. Register* on December 21, 2001, at 48 DCR 11,559.

Board Member Disclosures. James H. Hannaham disclosed that both he and SCSD counsel Andrea C. Ferster are members of the Committee of 100 on the Federal City, and that both he, Ms. Ferster, and SCSD expert witness Kirk White had served together on the Board of Trustees for the Committee of 100. Geoffrey H. Griffis disclosed that he also was a previous trustee of the Committee of 100. Anne M. Renshaw disclosed that she was a member of a group of abutting property owners that Ms. Ferster had represented several years ago in a Board of Zoning Adjustment case. All three members stated that they could be fair and impartial. No one objected to their participation in the case.

Curtis L. Etherly, Jr., disclosed that he resides in the neighborhood where the subject property is located. About one month after moving into the neighborhood and before becoming a Board member, he had signed a petition in support of the Girls and Boys Town project. He stated that he could be fair and impartial in deciding the appeal, and none of the parties objected to his participation.

SCSD Motion for Stay Pending BZA Appeal. At the time of filing its appeal, SCSD requested the Board to stay the issuance of any construction or other permits for the subject property pending the Board's decision on the appeal. Ex. 3. ANC 6B subsequently joined in this request. Ex. 28. Under D.C. Code § 6-641.07(g)(1) and (4) (2001), the Board has authority to reverse, affirm, or modify the decision of the Zoning Administrator to approve the issuance of a building permit if the Board determines that the Zoning Administrator erred in carrying out or enforcing the Zoning Regulations. But the Board does not have authority to prohibit the Department of Consumer and Regulatory Affairs (DCRA) from issuing construction or other permits. At the December 4 public hearing, the Board therefore denied the motion for lack of jurisdiction.

Appellants' Motion for BZA-Issued Stop Work Order. On September 20, 2001, SCSD filed a written request that the Board order, through a stop work order or other appropriate mechanism, all construction pursuant to the disputed building permits stopped. SCSD also requested the Board to stay any other permits that may have been issued relating to construction on the subject property pending the Board's decision on the appeal. Ex. 19. ANC 6B subsequently joined in this request. Ex. 28. At the December 4 hearing, the Board denied the Appellants' request. In addition to the reasons cited above with respect to the Appellants' motion for a stay pending the BZA appeal, DCRA issues stop work orders pursuant to the Construction Codes Supplement, Title 12 DCMR, not the Zoning Regulations, Title 11 DCMR. Therefore, the Board may not compel DCRA to issue a stop work order.

Evidentiary Rulings. The Board's evidentiary rulings are set out in Appendix B to this Decision and Order, which is fully incorporated herein.

Appellants' Case. The Appellants argued that the Zoning Administrator's determination to approve the four building permits in question as a matter of right would allow Girls and Boys Town to evade the occupancy limits and spacing requirements of the zoning regulations pertaining to community-based residential facilities by spreading a single development over several contiguous lots, even though the development is identical in every respect to a large facility that could be built only after special exception review and approval.

The Appellants presented written and oral testimony from Wilbert Hill, SCSD Chairman, and ANC 6B Vice-Chairman. Mr. Hill stated that the community is concerned about the concentration of community-based residential facilities in the neighborhood, and about the impacts of Girls and Boys Town project.

Kirk White was qualified as an expert in zoning. Mr. White testified that while the Zoning Administrator did not "violate" the Zoning Regulations, but that he made a "mistake" in not looking at the other units that were planned for the site, which were shown on the site plan, and adding up the number of individuals to be served. Tr. at 38-39, 70, 73-77 (Feb. 5, 2002). He also stated that the Zoning Regulations recognize both lots and lots of record, and such that a lot may be used to activate zoning on more than one parcel of land. Tr. at 40-41 (Feb. 5, 2002). According to Mr. White, a site plan review, such as would occur through the special exception process, is necessary to understand the project's impacts. Tr. at 43 (Feb. 5, 2002).

Patricia M. Harden, a licensed, clinical social worker and psychotherapist, with extensive experience with group homes, qualified as an expert in those areas. Tr. at 82, 84 (Feb. 5, 2002). Ms. Harden characterized the issue in the case as whether the Girls and Boys Town project is simply a series of small, independent group homes that coincidentally happen to be located side by side, or whether it is a single group home with all the operational characteristics of a single, larger home. Tr. at 85-86, 93 (Feb. 5, 2002). Since she did not have personal knowledge about the project, her testimony was based upon her professional experience. Tr. at 92-93 (Feb. 5, 2002). Ms. Harden testified that a single group home may consist of separate structures or living units. She outlined the characteristics that would distinguish a large group home consisting of several buildings from a small, stand-alone group home for six children. Tr. at 93-96, 102, 109 (Feb. 5, 2002).

Brian R. Furness, chairman of the Capitol Hill (CHRS) Community Development Committee, and past-president of CHRS, has been involved in community issues relating to planning, land use, historic preservation, and transportation. He described the Comprehensive Plan and Ward 6 Plan provisions relevant to the Girls and Boys Town project, and stated that these provisions support the need for special exception review of the project. Tr. at 120-26, 130 (Feb. 5, 2002). He also acknowledged that while the Comprehensive Plan requires the Zoning Administrator to evaluate building permit applications in connection with the Comprehensive Plan, he was not familiar with any remedies for the failure to do so. Tr. at 145 (Feb. 5, 2002).

The Appellants included within their case a written report from CHRS and oral testimony from Robert L. M. Nevitt, CHRS president. CHRS is concerned that if the Zoning Administrator's decision is allowed to stand, "large community-based residential facilities, masquerading as a number of small matter-of-right facilities," will adversely affect the Capitol Hill community. Tr. at 147 (Feb. 5, 2002). According to CHRS, this appeal turns on the definition of the word "facility." Since the word "facility" is not defined in the Zoning Regulations, Mr. Nevitt, applying the *Webster's Dictionary* definition, concluded that the four Phase I buildings constitute one facility since they will be owned, operated, and supervised by Girls and Boys Town. Mr. Nevitt also stated that the Zoning Administrator was or should have been on notice that the project was likely to be a single facility because there were four simultaneous applications for four separate building permits, construction of the four buildings was to occur simultaneously, and the buildings are part of a residential compound. They also serve a common purpose and are under common administration. Tr. at 148-49, 153-54 (Feb. 5, 2002); Ex. 31.

Ellen Opper-Weiner, SCSD vice-chairman, testified that SCSD brought this appeal because the neighborhood wants the opportunity to express its interests and concerns in the project through the special exception review process. Tr. at 156-59 (Feb. 5, 2002).

ANC Report. On December 3, 2001, ANC 6B filed a letter with the Board, with an attached report dated November 13, 2001, indicating that at the ANC's regularly scheduled and properly noticed meeting on November 13, 2001, with a quorum present, the ANC had voted to adopt the report. Ex. 36. Pursuant to 11 DCMR § 3101.6, the Board waived the seven-day advance filing deadline in § 3115.1 to receive the late-filed report.

The ANC report raises three issues and concerns. First, the ANC believes that the Zoning Administrator erred in deciding that the construction of the four buildings could proceed as a matter of right. The ANC asserts that special exception approval is required because all four buildings will be built and administered in the aggregate, developed by the same organization, contained within the same complex, and have a uniform set of rules, employees, contractors, and administrative systems. Second, the ANC asserts that a youth residential care home for seven to fifteen persons cannot be permitted in a C-2 District as a matter of right pursuant to 11 DCMR § 721.5 if another property in the same square contains an existing community-based residential facility for seven or more persons. Third, the ANC asserts that the Zoning Administrator did not apply the spacing rule, also in § 721.5, which precludes use as a youth residential care home as a matter of right if another property containing an existing community-based residential facility for seven or more persons is located within 500 feet of the facility. Since there is an existing facility for eight persons within the same square and within 500 feet of the subject property, the ANC asserts that Zoning Administrator erred in approving the permits. The ANC concludes that approval violates the letter and spirit of the zoning regulations because it would permit the developer to evade the regulations that control the concentration of community-based residential facilities.

At the public hearing, ANC Chairman Kenan Jarboe presented the November 13 report. He emphasized that the four contiguous buildings should be regarded as one unit, and that Girls and Boys Town has always presented them to the community as a whole, not as four separate units. Treating them as four separate units would allow the developer to circumvent public discussion of the project by circumventing the special exception process. Tr. at 166-67 (Feb. 5, 2002); Ex. 41. The ANC did not independently present or cross-examine witnesses, or present closing argument, but rather relied upon SCSD to represent the ANC's interests.

Zoning Administrator's Case. In approving the four Girls and Boys Town building permits, the Zoning Administrator determined that the proposed use of the property was a matter of right. He argued that he properly approved the permits in accordance with the Zoning Regulations, and that to have reviewed the application in the context of the nature and final result of the project would be an improper use of his authority and discretion. Toye Bello, then-Acting Zoning Administrator, appeared at the hearing on behalf of the Office of the Zoning Administrator.

Property Owner's Case. Girls and Boys Town takes the position, based on 11 DCMR § 201.1(n)(1), that the use of each record lot as a youth residential care home for up to six children is permitted as a matter of right. Girls and Boys Town argues that in the absence of specific instructions in the Zoning Regulations, the Zoning Administrator may not look beyond lot lines in evaluating a building permit application.

Armando M. Lourenco and Gladys Hicks were qualified as zoning experts, and provided the Board with written reports. Mr. Lourenco testified that in his opinion, the plans upon which the building permits were based comply with the Zoning Regulations, that the processing of the permits followed standard review procedures, and that the Zoning Administrator's decision was consistent with the Zoning Regulations and long-standing practices of the Office of the Zoning Administrator. Ms. Hicks testified that the Zoning Administrator was limited to examining each permit application separately, since they involved separate lots of record. Based on her review

of the construction documents, she concluded that the Zoning Administrator did not err in approving the four permits. Ex. 49.

Constance Jefferson-Washington is the Site Director for Girls and Boys Town, and responsible for its day-to-day operations. She currently oversees the Sargent Road facility, and will oversee the four buildings at Potomac Avenue when they are completed. She was qualified as an expert in social work, and testified regarding the future operations of the four buildings.

The applicant also made the project architect, Karen Burditt, of Esakoff and Associates, available for questioning by the Board with respect to the site plan.

Dispositive Motions. At the conclusion of the Appellants' case, the Zoning Administrator made an oral motion to dismiss the case on the grounds that the Appellants had failed to demonstrate by a preponderance of the evidence that the Zoning Administrator's decisions were in error. Girls and Boys Town supported the motion, and the Appellants opposed the motion. It is within the Board's discretion to entertain a motion to dismiss after the appellant's opening case. The Board determined to decide this appeal after hearing all of the evidence and arguments in the case, and therefore denied the motion. Tr. at 204-18 (Feb. 12, 2002).

In his post-hearing brief, the Zoning Administrator again asked the Board to dismiss the appeal. Ex. 67, page 6. As discussed in this Decision and Order, the Board has determined that the Appellants have provided sufficient evidence to support their contention that the Girls and Boys Town project is one community-based residential facility for 24 youth residents that requires special exception approval. Accordingly, the Zoning Administrator's motion is denied.

Closing of the Record. The record closed on February 19, 2002, with the exception of a copy of the definition of the word "facility" from Webster's Dictionary, to be supplied by the Appellants. The Board heard closing arguments on February 26. In addition, the Board requested from all parties post-hearing briefing and proposed findings of fact and conclusions of law.

Decision Meeting. At its public meeting on May 7, 2002, the Board, voted 4 – 0 – 1, with one member abstaining, to grant the appeal.

Corrections to the Transcript. In the course of preparing this Decision and Order, the Board discovered a number of transcription errors in the transcript of its May 7, 2002, decision meeting. Accordingly, the Board has on its own motion ordered the transcript corrected. The corrections are listed in Appendix C to this Decision and Order.

FINDINGS OF FACT

The Subject Property

1. On February 10, 2000, Girls and Boys Town purchased in two separate transactions Lots 127, 128, 817, 818, 828, 836, 837, 840, and 841 in Square 1045, consisting of a land area of 2.1 acres. Ex. 32, page 2.

2. Pursuant to Girls and Boys Town application, the District of Columbia Office of the Surveyor recorded on March 5, 2001, a subdivision plat that reconfigured the nine lots acquired in Square 1045 into six record lots, Lot Nos. 132 – 137. Ex. 32, page 2 and attachment A.

3. The property that is the subject of this appeal consists of four of these record lots, Lots 134, 136, 137, and 138, at premises 1308, 1310, 1312, and 1314 Potomac Avenue, S.E.

4. The property is located in the Capitol Hill neighborhood, in a C-2-B Zone District.

5. There is a Residence Zone District located within 25 feet of the subject property.

6. As described in 11 DCMR § 720.6, the C-2-B District is a Community Business District designed to serve commercial and residential functions for large segments of the city outside of the central core.

7. Matter-of-right uses in the C-2-B District include one-family dwellings, flats, multiple dwellings, rooming and boarding houses, hotels, private schools, college and university uses, child/elderly development centers, community center buildings, office use, various subcategories of retail and service establishments, and certain community-based residential facilities. *See* 11 DCMR § 701.

The Girls and Boys Town Project

8. The project architect describes the project as "Phase I" of a two-phase development of the Girls and Boys Town "D.C. Pennsylvania Avenue Campus." Ex. 30 (Vol. 2, ex. 8 (Architect's description; May 10, 2001)).

9. The site plan for Phase I also identifies the project as the "Pennsylvania Avenue Campus, SE." Ex. 57.

10. Phase I consists of four adjacent buildings fronting on Potomac Avenue, S.E.

11. Girls and Boys Town has undertaken the construction of all four buildings simultaneously, with the same general contractor, as part of one overall construction project. *See, e.g.,* Ex. 30 (Vol. 1, ex. 2, raze permits, building permit applications, building permits, and contract agreements).

12. Adjacent to the westernmost lot, Lot 137, there is a public alley opening to Potomac Avenue. Girls and Boys Town will construct a driveway along the rear lot line of all four lots and the eastern side lot line of the easternmost lot, Lot 134, connecting the public alley and Potomac Avenue. The Potomac Avenue entrance is designated as the delivery entrance. Ultimately the driveway will extend to Pennsylvania Avenue, which is designated as the main entrance to the campus. Ex. 30 (Vol. 2, ex. 2 (site plan) and ex. 8 (description of the project by the project architect).

13. The building on Lot 137 has two side yards, while the other three buildings each have one wall on the side lot line and a side yard on the western side. Each building will have a front yard and a rear yard. Ex. 57.

14. Each building has three entrances, including a front entrance facing Potomac Avenue and a rear, back porch entrance opening to the rest of the proposed campus. The primary entrance for the children will be the rear entrance. There is also a side mudroom entrance onto the kitchen. Tr. at 388, 392 (Feb. 19, 2002); Ex. 30 (Vol. 2, ex. 8 (May 10, 2001)).

15. Each building has a living room and a kitchen and dining area on the first floor. There is also a small office on the first floor, with its own bathroom, and a laundry room. The main stairway leads to three children's bedrooms on the second floor, with a bathroom with two toilets, two vanities, and two showers. There is a separate living area for the parent-teachers. The parent-teacher portion of the building is connected to the children's portion on both the first and second floor. The parent-teacher portion includes a living room, dining area, and a small kitchenette on the first floor; a second stairway; a master suite with a connecting bath; a second bedroom with a full bath; and a den that serves as a connecting area between the children's portion of the building and the parent-teacher portion of the building on the second floor. Tr. at 389-91, 393 (Feb. 19, 2002); Ex. 57.

16. The site plan shows that the four lots will be surrounded by a fence. Ex. 30(a) (Vol. 1, ex. 2). There will be a three-foot high, decorative metal fence along the front of all four lots. Tr. at 352, 395-96 (Feb. 19, 2002). Girls and Boys Town will install an eight-foot fence along all four lots at the rear. Tr. at 352, 395 (Feb. 19, 2002).

17. The project architect testified that each building will have one parking space at the rear of the lot, accessed from the common driveway that opens to the alley. Tr. at 388, 394 (Feb. 19, 2002).

18. The project architect's written description of the project, however, indicates that "Parking for two cars will be provided for each home." It also states that "The site will have an internal road connecting Potomac, Pennsylvania and the rear alley. Additional parking for 20 cars will be accommodated along this road network, including parking for the Group Homes." Ex. 30(b) (Vol. 2, ex. 8, Memorandum from Esocoff & Associates dated May 10, 2001). The site plan that accompanies this statement shows that there will be nine parallel parking spaces along the rear of the four lots. Two of the parking spaces overlap lot lines. Ex. 30(a) (Vol. 1, ex.2). The Board finds that the parking plan for the project is that indicated in the site plan and written description.

19. The driveway entrance from the alley will be secured, with a gate and key card or other controlled access system. Only Girls and Boys Town staff will have access to the driveway entrance. Tr. at 395-96 (Feb. 19, 2002); Vol. 2, ex. 8 (Architect's description; May 10, 2001).

20. The youth residents will consist of abused, neglected, and orphaned children. Tr. at 235, 239 (Feb. 19, 2002).

21. Up to six children will reside in each of the four group homes. A "parent-teacher" couple will also reside in each home. Tr. at 340-41 (Feb. 19, 2002).

22. The parent-teacher couple will be full-time Girls and Boys Town employees. Tr. at 343 (Feb. 19, 2002). Girls and Boys Town will also hire one assistant for each four parent-teacher couple, for times when they are on vacation or away. The assistant will not live in the home. Tr. at 344 (Feb. 19, 2002).

23. Each group home will be operated as an individual household. Each parent-teacher couple will be responsible for managing their own budget, doing their own shopping, and preparing their own meals. Tr. at 341 (Feb. 19, 2002). The budget for each home, however, will be part of Girl's and Boy's Towns overall organizational budget. Tr. at 382 (Feb. 19, 2002).

24. The children and the parent-teacher couple will dine as a family. Tr. at 341 (Feb. 19, 2002).

25. Girls and Boys Town employs licensed clinical social workers who will prepare individual treatment plans for each child at the time of intake and on an ongoing basis. There will most likely be two social workers, one for each two homes. Tr. at 345-46, 384 (Feb. 19, 2002).

26. The social workers and a Girls and Boys Town consultant will supervise each building. Tr. at 382 (Feb. 19, 2002).

27. Each of the four buildings will be provided with central administrative support and oversight, including payroll, shared social workers, and staff training. Tr. at 373, 385 (Feb. 19, 2002).

28. The shared administrative oversight for the project will enable Girls and Boys Town to maintain compliance with regulatory requirements, as well as Girls and Boys Town's own internal standards of operation. Tr. at 385 (Feb. 19, 2002).

29. The Girls and Boys Town Site Financial Officer will pay the utility bills for all four buildings, as well as the costs of repairs. Tr. at 350-51 (Feb. 19, 2002).

30. Girls and Boys Town will assign one van to each group home. The homes will not share the vans. Tr. at 342 (Feb. 19, 2002). If a van requires repairs, the social worker responsible for the particular home to which the van is assigned will arrange for the necessary services. The parent-teacher couple, however, would have the ability to rent or substitute another vehicle if the assigned van breaks down. Tr. at 383-84 (Feb. 19, 2002).

31. The children will participate in recreational activities according to their individual interests. However, there will potentially be a common recreation area, possibly including a shared basketball hoop. Tr. at 357-58, 373 (Feb. 19, 2002). According to the architect's written description of the project, there will be a half-court basketball court and a large playing field at

the rear of the group homes, across the common driveway. Ex. 30 (Vol. 2, ex. 8 (Architect's Description; May 10, 2001)).

32. There will likely be certain occasions and special events that will be attended by the children residing in all four homes, including the possible use of space in the future Phase II administration building, an annual tree lighting, and back to school picnics. Tr. at 373-74 (Feb. 19, 2002).

33. Girls and Boys Town has not yet applied for licenses from the Child and Family Services Administration, but anticipates applying for four separate licenses, one for each home. Tr. at 375 (Feb. 19, 2002).

The Building Permits and the Zoning Administrator's Decision

34. In the C-2 District, a youth residential care home for six children, not including resident supervisors or staff and their families, is permitted as a matter of right. A youth residential care home for 7 to 15 children is also permitted as a matter of right, provided there are no other properties containing an existing community-based residential facility for 7 or more persons in the same square or within 500 feet of the subject property. A youth residential care home for 16 to 25 children is permitted as a special exception. *See* 11 DCMR §§ 721.1, 721.5, and 732.1(a).

35. Girls and Boys Town filed all four building permit applications with the Department of Consumer and Regulatory Affairs (DCRA) on the same day. Tr. at 235 (Feb. 12, 2002).

36. The application forms are virtually identical. Each application describes the proposed work as the construction of a two-story residence and cellar, with driveway. The forms indicate that the proposed use will be: "Residence Housing 6 youths, 2 adults, Youth Residential Care Home." Ex. 30(a) (Vol. 1 of the Appellants' Pre-Hearing Submission, ex. 2).

37. The Zoning Administrator reviewed all four applications in unison. Tr. at 237-38 (Feb. 12, 2002).

38. In reviewing a building permit application, the Zoning Administrator reviews not only the building plans, but also the uses that are proposed for the building. Tr. at 252 (Feb. 12, 2002); Tr. at 268 (Feb. 19, 2002). The building permit plans must be consistent with the declared use. Tr. at 269 (Feb. 19, 2002).

39. Once the Zoning Administrator understands what the proposed use is, that understanding guides the rest of the review. As stated by Girls and Boys Town's zoning expert, Armando Lourenco, "It's going to guide the approval, and ultimately is going to guide the issuance of a certificate of occupancy once the construction is approved before the space can be used, and any subsequent inspections that the zoning inspectors may make to the site, and they better find the right use there." Tr. at 269 (Feb. 19, 2002).

40. At the time of reviewing the applications, the Zoning Administrator was aware that the building permit applications involved contiguous lots that were owned by the same property owner; however, he did not give any consideration to whether the four buildings were part of a larger project. Tr. at 225, 238 (Feb. 12, 2002).

41. The Zoning Administrator did not request the applicant to provide additional information concerning the applications or the relationship between them. Tr. at 238 (Feb. 12, 2002).

42. Since he regarded the proposed use of the lots as a matter of right, the Zoning Administrator did not review the Comprehensive Plan in making his determination. Tr. at 117-18, 257, 269 (Feb. 12, 2002).

43. The Zoning Administrator determined that Phase I of the Girls and Boys Town project was in compliance with the Zoning Regulations since the building permit applications and plans submitted showed that each home would house no more than six residents. He also concluded since each building would be located on a separate lot of record, the project would not be subject to the 500-foot radius limitation in §§ 701.3 or 725.1. Ex. 4.

44. The Zoning Administrator reviewed and signed off on all four permits on the same day, July 5, 2001, allowing the permits to proceed as matter-of-right construction and use. Ex. 30 (Vol. 1, ex. 2, building permit approval pages).

45. The Zoning Administrator acknowledged that if Girls and Boys Town had sought to construct all four buildings on a single lot of record with an occupancy of 24 youth residents, then Girls and Boys Town would have been required to seek a special exception under 11 DCMR § 732 to permit use as a youth residential care home and a variance from § 3202.3 to permit the construction of multiple main buildings on a single lot of record. Tr. at 258-60 (Feb. 12, 2002).

46. On September 6, 2001, DCRA issued Building Permit No. B438335 to Father Flanagan's Boy's Home, a "Misc./New Const./Fence" permit, for the construction of a two-story residence with driveway, at 1308 Potomac Avenue, S.E. (Square 1045, Lot 137), to be occupied at a "CRF / 6 youths and 2 adults." Ex. 24.

47. On September 6, 2001, DCRA issued Building Permit No. B438336 to Father Flanagan's Boy's Home, a "Misc./New Const." permit, for the construction of a two-story and cellar residence with driveway, at 1314 Potomac Avenue, S.E. (Square 1045, Lot 134), to be occupied as "housing / 6 youths and 2 adults." Ex. 24.

48. On September 6, 2001, DCRA issued Building Permit No. B438337 to Father Flanagan's Boy's Home, a "Misc./New Const." permit, for the construction of a two-story and cellar residence with driveway, at 1312 Potomac Avenue, S.E. (Square 1045, Lot 135), to be occupied as "housing / 6 youths and 2 adults." Ex. 24.

49. On September 6, 2001, DCRA issued Building Permit No. B438338 to Father Flanagan's Boy's Home, a "Misc./New Const." permit, for the construction of a two-story and cellar

residence with driveway, at 1310 Potomac Avenue, S.E. (Square 1045, Lot 136), to be occupied as "housing / 6 youths and 2 adults." Ex. 24.

50. Notwithstanding the use categories indicated on the permits, the Board finds that the use authorized by each permit was that of a "youth residential care home," a subcategory of the use designated in the Zoning Regulations as a "community-based residential facility."

The Four Buildings and Use Constitute One Community-Based Residential Facility

51. Prior to January 22, 1993, the Zoning Regulations had only permitted certain community-based residential facilities with four or fewer residents as a matter of right. Reference to the definition of "family" in 11 DCMR § 199.1, however, would seem to indicate that six unrelated individuals could live in a one-family dwelling as a matter of right. Because the regulations could thus potentially discriminate against handicapped individuals, the Zoning Commission, in Z.C. Order No. 725, effective January 22, 1993, amended the regulations to permit certain facilities for six or fewer individuals as a matter of right. Ex. 32, attachment E.

52. The definition of the phrase "community-based residential facility" in 11 DCMR § 199.1 contains a cross-reference to "facilities covered by D.C. Law 2-35, the Community Residence Facilities Licensure Act of 1977." D.C. Law 2-35, relating to community residence facilities, defines the term "facility" as "The overall organization and program and services, including staff personnel, the building or buildings, equipment and supplies necessary for implementation of health, nursing, and sheltered care services."[2]

53. *Webster's Third New International Dictionary* (G & C Merriam & Company 1971) defines the word "facility" as "something that is built, constructed, installed, or established to perform some particular function or to serve."

54. Mr. Bello testified that in the definition of "community-based residential facility" in the Zoning Regulations, the word "structure" could be substituted for the word "facility," and that the phrase "community-based residential facility" means the same thing as "community-based residential building." Tr. at 272 (Feb. 12, 2002).

55. Mr. Lourenco testified that since the term "community-based residential facility" is a defined term, it is not necessary to resort to *Webster's Dictionary* to determine the meaning of the word "facility." Tr. at 284 (Feb. 19, 2002).

56. Mr. Bello testified that a community-based residential facility could not consist of more than one building, and that there would be no instances in which the Zoning Administrator would

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[2] D.C. Law 2-35, the Community Residence Facility Licensure Act of 1977, 24 DCR 1458, 4056 (1977), amended the Health Care Facilities Regulation of 1974, which contained the definition of "facility" quoted above. 20 DCR 1423, 1424 (1974). The 1977 Act did not repeal or amend the definition of the word "facility." The 1977 Act has since been repealed and replaced by the Health-Care and Community Residence Facility Licensure Act of 1983, but the definition of the word "facility" remains intact in 22 DCMR § 3099, a regulation adopted to implement the 1983 Act.

look to see if a use extends beyond one building to multiple buildings. Tr. at 273-74 (Feb. 12, 2002). He also stated that in his experience, the Zoning Administrator has never looked at the cumulative effect of record lots for purposes of determining whether zoning relief is required, nor beyond record lot lines with regard to occupancy limits. Tr. at 261-62 (Feb. 12, 2002).

57. However, Mr. Bello also testified that a "lot" for purposes of zoning may include several "lots of record." Such a lot is "[n]ot within the geographic meaning of what a lot is as a defined boundary of property and not within the meaning of the requirement that a lot be recorded with the surveyor's office which would then have as attended computations as to lot size and dimensions." Tr. at 253 (Feb. 12, 2002).

58. Mr. Lourenco testified that the Zoning Administrator is required to judge the proposed use and proposed building for each lot of record. Tr. at 287.

59. Mr. Lourenco testified that a "community-based residential facility" could be housed in more than one building. Tr. at 288-92 (Feb. 19, 2002).

60. Mr. Lourenco also stated that a single facility can exist on more than one lot of record. Tr. at 301 (Feb. 19, 2001).

61. As recognized by Mr. Lourenco, assessment and tax lots are used to permit development where a record lot subdivision cannot be performed. Tr. at 255-56 (Feb. 19, 2002).

62. Also, as recognized by Mr. Lourenco, in circumstances involving assessment and tax lots, the Zoning Administrator may not be "able to rule entirely on the development, and the application is referred to the BZA for relief." Tr. at 255-56 (Feb. 19, 2002).

63. The Appellants' zoning expert, Kirk White testified that the only way the building permits could have been issued would have been on a per record lot basis, but that "you can't just look at development occurring in this lot and this lot and thereby get around the requirements on size and CBRFs." Tr. at 54 (Feb. 5, 2002). On cross-examination, Mr. White also agreed with the statement that "the Zoning Administrator followed the zoning regulations by the book in this case rather than looking at the bigger picture," but stated further that "that's a mistake." Tr. at 55 (Feb. 5, 2002); *see also* Tr. at 38-39, 69-70, 73-77 (Feb. 5, 2001). The Board finds therefore that Mr. White's testimony cannot be reasonably construed as an admission that the Zoning Administrator did not err in interpreting or applying the Zoning Regulations.

64. Mr. White testified that "uses that require special exceptions under the Zoning Regulations are capable of being spread out over more than one lot of record." Tr. at 39 (Feb. 5, 2001).

65. The Girls and Boys Town community outreach materials describe the four homes as "the facility" or a "residence" or "residences" that will provide long-term care for 24 children. For example, these materials state "The long-term residence will consist of four quality Victorian town homes being designed by Weinstein Associates Architects. Each home will function as a true family, headed by a highly trained married couple and an assistant caring for six children."

Ex. 50. The Board finds that these materials indicate that Girls and Boys Town views the four group homes as comprising one facility for 24 children.

65. Based on Findings Nos. 8-13, 16, 18, 19, 22, 25-32, 35-37, 44, 45, 52, 53, 57, 59, 60, and 63-65 and as further explained in the Board's Conclusions of Law and Opinion, the Board finds that the four group homes constitute one community-based residential facility, a youth residential care home for 24 children.

The Sargent Road Facility

66. In its final Decision and Order in BZA Application No. 16531 dated December 21, 2000, involving Father Flanagan's Boys Town of Washington facility on Sargent Road, N.E., the Board approved a special exception to permit Father Flanagan's to construct four youth residential care home building units, each not housing more than six persons, on a single lot in an R-2 District. Girls and Boys Town also operates an emergency shelter on the lot. Ex. 32, attachment J.

67. In BZA Application No. 16531, the Board was concerned whether it could approve the youth residential care home buildings as a special exception or whether a use variance was required, since 11 DCMR § 303.1 authorizes special exception relief for youth residential care homes for 9 to 15 youths in an R-2 District, "while Boys Town proposed increasing the total number of persons approved for its existing youth residential care home on a single lot from 15 to 24 . . . ." Ex. 32, attachment J, page 1. The Board therefore requested the Zoning Administrator to review the application. Ex. 32, attachment J, page 1.

68. As described in BZA Application No. 16531:

> The Zoning Administrator concluded that Boys Town had sought complete and proper relief, since each proposed home would house not more than six youths. If the subject property had been subdivided so that each home was on a separate lot, each of the four homes could have been used as a youth residential care home as a matter of right. *See* 11 DCMR § 300.3.

Ex. 32, attachment J, pages 1-2. Accordingly, the Board processed the application as a special exception rather than a use variance.

69. In BZA Application No. 16531, the Board also stated in its Conclusions of Law that "This special exception will allow Boys Town to construct four homes to accommodate 24 youths; however, each individual home will only accommodate six youths, which if the property had been subdivided, could have been constructed and used under 11 DCMR § 300.3 as youth residential care homes as a matter of right." Ex. 32, attachment J, page 13. The Board's decision did not further explain or analyze this proposition.

70. The Board's Decision and Order in BZA Application No. 16531 relied upon a memorandum from the Zoning Administrator dated April 10, 2000, in which the Zoning

Administrator reviewed the campus-like setting of the facility, as well as the fact that Father Flanagan's Boys Home would own the entire property and set program requirements on an overall basis. Ex. 30(a) (Vol. 1 of Appellants' Pre-hearing Submission, ex. 4).

71. Counsel for Girls and Boys Town acknowledged that the four homes to be constructed at the Girls and Boys Town Sargent Road facility are very similar to Phase I of the Pennsylvania Avenue Campus project. Tr. at 305 (Feb. 19, 2002).

72. In a post-hearing brief, Girls and Boys Town states that it relied upon the building permits issued by DCRA, as well as the above-quoted statements from the Board's decision in BZA Application No. 16531, in entering into the Phase I construction contracts and beginning construction. Ex. 65, pages 2, 4 n.2. Girls and Boys Town, however, did not provide any evidence in support of this statement, or any other evidence relating to reliance upon the statements in the Sargent Road decision.

73. The Board finds that any reliance upon the statements in the Sargent Road Decision and Order on the part of Girls and Boys Town was unreasonable in that the statements related to a hypothetical situation and were not accompanied by any analysis. SCSD and ANC 6B filed the instant appeal shortly after the Pennsylvania Avenue Campus Phase I building permits were issued, placing in question the merits of the very statements included in the Sargent Road decision.

74. Girls and Boys Town does not yet have a contract with the District of Columbia Child and Family Services Administration for the placement of foster children in the four group homes that are the subject of this appeal. Tr. at 375 (Feb. 19, 2001).

CONCLUSIONS OF LAW AND OPINION

The Board is authorized under § 8 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 797, 799; D.C. Code § 6-641.07(f) and (g)(1) (2001)), to hear and decide appeals where it is alleged by an appellant that there is error in any decision by an administrative officer in the carrying out or enforcement of the Zoning Regulations. This appeal is properly before the Board pursuant to 11 DCMR §§ 3100.2, 3101.5, and 3200.2. The notice requirements of § 3112 for the public hearing on the appeal have been met.

The central issue in this appeal is whether the Zoning Administrator erred in approving the issuance of four building permits for the construction of four buildings to be used as youth residential care homes, each housing six children, as a matter of right. For the reasons stated below, the Board concludes that the project consists of one facility that will provide shelter and care for 24 children, such that it requires special exception approval.

Applicable Regulations

In addition to regulations governing the location, height, and bulk of buildings and other structures and density of population, section 1 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 797, as amended; D.C. Code § 6-641.01 (2001)), authorizes the Zoning Commission to adopt regulations governing the "uses of buildings and structures and the uses of land." The Zoning Regulations at issue in this case are such use restrictions.

The Zoning Regulations establish a use category designated "community-based residential facility," which is further divided into seven use subcategories, adult rehabilitation home, community residence facility, emergency shelter, health care facility, substance abusers home, youth rehabilitation home, and youth residential care home. *See* 11 DCMR § 199.1 (definition of "community-based residential facility"). The use in question in this case is use as a youth residential care home.

In general, the Zoning Regulations contain a tiered system that subjects youth residential care homes to numeric occupancy limits and spacing (or dispersal) requirements. The Board of Zoning Adjustment reviews and approves youth residential care homes with higher occupancy levels through a public hearing process that affords the public the opportunity to review and comment on the proposed use.

The first tier cuts off at six youth residents, which bears some relationship to the definition of the word "family" in 11 DCMR § 199.1.[3] Thus, in a C-2 District, use as a youth residential care home for six or fewer persons, not including resident supervisors or staff and their families, is permitted as a matter of right. See 11 DCMR § 201.1(n)(1), applicable in the C-2 District by cumulative cross-references in §§ 300.3, 320.3, 330.5, 350.4, 501.1, 701.2, and 721.1.

The second tier in the C-2 District, a youth residential care home for seven to fifteen persons, not including resident supervisors or staff and their families, is also permitted as a matter of right, provided there are no properties containing an existing community-based residential facility for seven or more persons in the same square or within a radius of 500 feet from any portion of the subject property. 11 DCMR § 721.5.

The third tier in the C-2 District, a youth residential care home for 16 to 25 persons, not including resident supervisors or staff and their families, requires special exception approval under § 732.1(a), which incorporates by reference the specific conditions required for approval listed in § 358, pertaining to youth residential care homes in the R-5 District.

A special exception is presumed appropriate, reasonable, and compatible with other uses in the same zone district, provided that the specific regulatory conditions for the requested special

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[3] The Zoning Regulations define "family" in 11 DCMR § 199.1 as:

> one (1) or more persons related by blood, marriage, or adoption, or not more than six (6) persons who are not so related, including foster children, living together as a single house-keeping unit, using certain rooms and housekeeping facilities in common; Provided, that the term family shall include a religious community having not more than fifteen (15) members.

exception are met. *See Stewart v. District of Columbia Bd. of Zoning Adjustment,* 305 A.2d 516, 518 (D.C. 1973). In reviewing an application for special exception approval of a youth residential care home in a C-2 District, the Board's discretion is limited to the determination of whether the applicant meets the specific conditions of § 732.1(a) for youth residential care homes and the general conditions for special exception approval listed in § 3104.1. *See* 305 A.2d at 518. As part of its review, the Board may properly consider important public interest concerns, including the public need for the proposed use, as well as potential harm to the public. *See Williams v. District of Columbia Bd. of Zoning Adjustment,* 535 A.2d 910, 911 & n.2 (D.C. 1988). If an applicant for special exception approval meets the burden of proof, the Board must ordinarily grant the application. *See Stewart*, 305 A.2d at 518.

The Meaning of the Word "Facility"

To determine whether the Girls and Boys Town project consists of four separate youth residential care homes that may be permitted as a matter of right or one youth residential care home that requires special exception approval, it is necessary to consider the definition of the phrase "youth residential care home," which is in turn subsumed within the definition of the phrase "community-based residential facility."

A community-based residential facility is defined in 11 DCMR § 199.1 as:

> a *residential facility* for persons who have a common need for treatment, rehabilitation, assistance, or supervision in their daily living. This definitions includes, but is not limited to *facilities* covered by D.C. Law 2-35, the Community Residence Facilities Licensure Act of 1977, and *facilities* formerly known as convalescent or nursing home, residential halfway house or social service center, philanthropic or eleemosynary institution, and personal care home.
>
> If an establishment is a community-based residential facility as defined in this section, its shall not be deemed to constitute any other use permitted under the authority of these regulations. A community-based residential facility may include separate living quarters for resident supervisors and their families.

(emphasis added). The definition of the word "community-based residential facilities" goes on to further define seven subcategories of community-based residential facilities. A "youth residential care home" is defined as:

> a *facility* providing safe, hygienic, sheltered living arrangements for one (1) or more individuals less than eighteen (18) years of age, not related by blood, adoption, or marriage to the operator of the *facility,* who are ambulatory and able to perform the activities of daily living with minimal assistance.

(emphasis added).

The interpretation of the word "facility" contained both in the phrase (and in the definition of the phrase) "community-based residential facility" and in the definition of the phrase "youth residential care home" is central to the resolution of this appeal. In interpreting the zoning regulations relating to youth residential care homes in *Citizens Association of Georgetown v. District of Columbia Board of Zoning Adjustment,* 642 A.2d 125, 128 (D.C. 1994), the Court of Appeals emphasized the application of the traditional rules of construction to statutes and regulations. The analysis of a regulation begins with an examination of the words of the regulation itself. If the language of the regulation is clear and unambiguous, it is not necessary to look beyond its plain meaning. However, where there is ambiguity, it is appropriate to consider the various canons or maxims of construction, related statutes and regulations, dictionary definitions, and the policies and objectives of the regulation. The rules of statutory interpretation are not applied mechanically or in isolation from one another, but rather those aspects of the regulation that are logically relevant are compared and balanced to ascertain the meaning of the regulation. *See, e.g., id.* at 128-29.

The Language Contained in the Definition. The Board therefore begins by examining the words contained in the definition of "community-based residential facility." The word "facility" is used repeatedly throughout the definition of the phrase "community-based residential facility" and in the definition of all seven subcategories of such facilities, subsumed within the overall definition of the phrase "community-based residential facility." If "an establishment" is a community-based residential facility as defined in § 199.1, then "it shall not be deemed to constitute any other use permitted under the authority of [the Zoning Regulations]." It is clear then from a plain reading of the definition of "community-based residential facility" that a "facility" is "an establishment" and "a use."

The Words "Structure" or "Building" Cannot Be Substituted for the Word "Facility". "A word is known by the company it keeps." *Jarecki v. G.D. Searle & Co.,* 367 U.S. 303, 307 (1961), *quoted in Edwards v. United States,* 583 A.2d 661664 (D.C. 1990). Thus, in interpreting statutes and regulations:

> There is a presumption that the same words used twice in the same act have the same meaning. Likewise, the courts do not construe different terms within a statute to embody the same meaning. . . . Yet when the legislature uses certain language in one part of a statute and different language in another, the court assumes different meanings were intended. In like manner, where the legislature has carefully employed a term in one place and excluded it in another, it should not be implied where excluded. The use of different terms within related statutes implies that different meanings were intended.

Norman J. Singer, 2A *Statutes and Statutory Construction* § 46.06 at 193 (2000). Thus in construing the Zoning Regulations, the Court of Appeals has recognized the maxim that the expression of one thing implies the exclusion of others, such that the omissions should be understood as exclusions. *Citizens Association of Georgetown,*642 A.2d at 128.

The word "facility" is not limited to a "building" or a "structure" since § 199.1 separately defines the words "building" and "structure." Moreover, the definition of the phrase "community-based

residential facility" nowhere mentions the words "building" or "structure." The Board therefore rejects the Zoning Administrator's interpretation that the words "building" and "structure" can be substituted for the word "facility."

The Use of the Word "Facility" in Related Legislation. Another guide to the meaning of the word "facility" is its use in related legislation. *Edwards*, 583 A.2d at 664. Subsequent statutes on the same subject are generally construed together with prior statutes because they are presumed to be in accord with the legislative policy embodied in the prior statutes. *See* 2B *Statutes and Statutory Construction, supra,* § 51.02. A statute or regulation may adopt another statute by cross-reference:

> A special class of related statutes is created when one statute adopts the terms of the other without restating them. Thus, a statute may refer to another and incorporate all or part of it by cross-reference. . . . When the reference is made to a specific section of a statute, that part of the statute is applied as though written into the reference statute.

2B *Statutes and Statutory Construction, supra,* §§ 51.07 – 51.08 at 267, 274.

The definition of "community-based residential facility" in the Zoning Regulations includes and incorporates by reference "facilities covered by D.C. Law 2-35, the Community Residence Facilities Licensure Act of 1977." D.C. Law 2-35, relating to community residence facilities, in turn defines the word "facility" as "The overall organization and program and services, including staff personnel, the building or buildings, equipment and supplies necessary for implementation of health, nursing, and sheltered care services." *See* Finding No. 52, *supra.*

While D.C. Law 2-35 pertains to community residence facilities, a different subcategory of community-based residential facilities than youth residential care homes, the Board finds it appropriate to refer to the definition of facility in that statute as an aid to the interpretation of the word "facility" contained both in the definition of the phrase "community-based residential facility" and in the definition of the "youth residential care home" subcategory. First, community residence facilities and youth residential care homes are treated identically in the zoning regulations applicable in the C-2 District, s*ee* 11 DCMR §§ 201.1(n)(1), 701.3, 721.5, and 732.1 (all containing the same restrictions on community residence facilities and youth residential care homes), and identically or nearly identically in the Residence Districts. *See* §§ 201.1(n)(1) and (p), 303, 322, 332, and 358. Second, since the word "facility" is used throughout the definition of the phrase "community-based residential facility" and in the definitions of all seven subcategories, it should be given the same meaning throughout. *See* 2A *Statutes and Statutory Construction, supra* § 46.06 at 193. Finally, the definition of "facility" in D.C. Law 2-35 is consistent with the use of the word "establishment" in the definition of "community-based residential facility" and with the characterization of community-based residential facilities as a "use." It is also consistent with the policies and purposes of the community-based residential facilities as a whole, which are categorized and defined according to the services to be provided. It is not just a building or even multiple buildings that impact a neighborhood, but rather the pattern and intensity of the use of the buildings and land that

impacts a neighborhood. That use and its impacts can only be understood in the context of the overall program and services to be provided.

Dictionary Definition of the Word "Facility". The Appellants rely upon the definition of "facility" in *Webster's Third New International Dictionary,* while neither the Zoning Administrator nor Girls and Boys Town zoning expert found it necessary to resort to *Webster's.* Reference to the dictionary is appropriate, and indeed required under 11 DCMR § 199.2, in light of the presumption that words in a regulation that are not specially defined are used in accordance with their common definition and meaning. *See Concerned Citizens of Brentwood v. District of Columbia Bd. of Zoning Adjustment,* 634 A.2d 1234, 1243 (D.C. 1993). However, the common usage of the word "facility" is not at issue in this case, but rather its specialized usage in the regulatory scheme governing community-based residential facilities. Since the meaning of the word "facility" may be discerned from considering the community-based residential facility regulations as a whole, resort to the dictionary is not particularly helpful. *See also* 2A *Statutes and Statutory Construction, supra,* § 47.27 at 338 ("The use of dictionary definitions is appropriate in interpreting undefined statutory terms, but recourse to a dictionary is unnecessary if legislative intent may be readily discerned from reading the statute."). To the extent that the application of the *Webster's* definition is a contested issue, the Board concludes that the *Webster's* definition is consistent with the Board's interpretation of the regulations.

The Meaning of the Word "Facility" in Light of the Policies and Objectives of the Regulations. Finally, as recognized in *Citizens Association of Georgetown,* when interpreting any portion of a regulation, the "meaning of a term or phrase 'must be derived not from the reading of a single sentence or section, but from consideration of [the] entire enactment against the backdrop of its policies and objectives." 642 A.2d 125, 129 (D.C. 1994). Likewise, an interpretation that produces absurd or unjust results, or that is inconsistent with common sense should be avoided. 2A *Statutes and Statutory Construction, supra,* § 45.12. The community-based residential facility regulations require increased scrutiny and public review for those facilities with higher occupancy levels, since larger facilities may reasonably be expected to have a greater impact on adjacent and nearby properties than smaller facilities. For example, in a special exception proceeding, the Board must consider matters such as whether the facility will provide adequate parking for the needs of the occupants, employees, and visitors to the facility, and whether the facility will have an adverse impact on the neighborhood due to traffic, noise, and operations. *See, e.g.,* 11 DCMR §§ 358.4 and 358.6.

Thus, in *Williams v. District of Columbia Board of Zoning Adjustment,* 535 A.2d 910 (D.C. 1988), the Court of Appeals reviewed the Board's decision "granting a request by Hope Village for two special exceptions and a variance" to convert the use of three buildings from community residence facilities to substance abusers homes and adult rehabilitation homes. *Williams* is not directly applicable in that it involved three buildings, none of which could have been permitted as a matter-of-right. However, it is instructive in that the Court did not characterize the Board's decision as approving a total of six special exceptions and three use variances, with two special exceptions and one use variance applicable to each building, but rather as "two special exceptions and a variance," effectively treating all three buildings in question as one community-based residential facility.

Conclusion. The proper interpretation of the word "facility" in the phrase community-based residential facility and in the definition of youth residential care home is that a facility is a use, the nature and characteristics of which are ascertained according the overall program and services to be provided. Thus, a youth residential care home is "a facility providing safe hygienic, sheltered living arrangements" for young people under the age of 18. 11 DCMR § 199.1. As the Girls and Boys Town expert admitted, a facility may consist of more than one building and may extend over more than one lot of record. Any other interpretation would be inconsistent with the policies and objectives of the use restrictions contained in the Zoning Regulations, and the attendant numeric occupancy limits and spacing requirements of the community-based residential facility regulations.

The Record Lot Issue

With certain exceptions that are not relevant here, the Zoning Regulations do not permit the construction of more than one main building on a single lot of record. 11 DCMR § 3202.3. Due to the proximity of a Residence District, the four record lots in question could not have been combined (without variance relief) to permit pursuant to § 2517.1 the construction of the four buildings on a single lot.

The Zoning Administrator and Girls and Boys Town argue that as a result of § 3202.3, the Zoning Administrator was constrained to review each building permit application separately. Since each application proposed the use of a single record lot as a youth residential care home with six youth residents, they assert that the Zoning Administrator was compelled to approve the proposed construction and use as a matter of right. The Appellants on the other hand assert that a use may extend across several contiguous lots, and that § 3202.3 should not be interpreted in a manner that would effectively nullify the community-based residential facility use restrictions.

The Board concludes that a use permitted as a special exception may extend over several adjacent lots of record for the following reasons. First, the purpose of § 3202.3 is building lot control. The Zoning Administrator uses the record lot as a fundamental tool to enforce the area restrictions of the Zoning Regulations relating to "yards, courts, other open space, minimum lot width, minimum lot area, floor area ratio, percentage of lot occupancy, parking spaces, [and] loading berths . . . ." *See, e.g.,* 11 DCMR § 101.6 (relating to the subdivision of lots). Neither §§ 101.6 nor 3202.2 speaks to the "use" of a record lot nor to the "use" of the main building on a record lot. While these area restrictions play an essential role in controlling development and population density, and while density bears an important relationship to the intensity of a particular use and its impacts on adjacent and nearby properties, the area restrictions contained in the Zoning Regulations do not supplant the use restrictions.

Second, the Zoning Regulations do not apply solely to record lots. For example, the definition of the word "lot" in § 199.1 contains the caveat that "A lot may or may not be the land so recorded on the records of the Surveyor of the District of Columbia." Under § 199.2(c), the word "lot" also includes the words "plot" and "parcel." Moreover, none of the regulations pertaining to community-based residential facilities include the requirement that the facility be located on a lot of record or on a single lot. In fact, none of the regulations even contain the words "lot," "plot,"

or "parcel." *See* 11 DCMR §§ 199.1 (definition of "community-based residential facility"); 721.1, 721.5 (authorizing "uses" as a matter of right); and 724 ("uses" in the C-2 District subject to Board of Zoning Adjustment approval). Subsection 732.1, which authorizes special exception approval for youth residential care homes for 16 to 25 youths in the C-2 District, incorporates by reference the specific conditions listed in § 358 for youth residential care homes in the R-5 District. Section 358 does not describe youth residential care homes as existing on record lots or even lots, but rather uses phrases such as "subject property" and "subject location." *See* 11 DCMR §§ 358.3, 358.8; *see also* §§ 358.2 and 358.3 ("There shall be no other property containing a community-based residential facility . . . .").

Third, § 3203.1, pertaining to certificates of occupancy, does not speak to lots or record lots, but rather states that "no person shall use any structure, land, part of any structure or land" until a certificate of occupancy has been issued stating that the use complies with the Zoning Regulations. The word "land" carries a broader connotation than the word "lot."

Fourth, the Board's special exception authority is not limited to circumstances involving record lots or even single lots. For example, section 8 of the Zoning Act of 1938 authorizes the Zoning Commission to adopt regulations providing that "the Board of Zoning Adjustment may in appropriate cases and subject to appropriate principles, standards, rules, conditions, and safeguards set forth in the regulations, make special exceptions to the provisions of the zoning regulations in harmony with their general purpose and intent." D.C. Code § 6-641.07(d) (2001). The Commission in authorizing the Board to grant special exceptions pursuant to 11 DCMR § 3104.1 did not limit special exceptions to uses existing on a single record lot.

Finally, the interpretation advanced by the Zoning Administrator and Girls and Boys Town would enable property owners to circumvent the numeric occupancy limits and the spacing requirements contained in the zoning regulations relating to community-based residential facilities by artificially dividing a proposed use so that the various buildings required for the use are located on separate lots of record.

Based on the above, the Board concludes that the Zoning Administrator erred in determining that as a result of the building lot control regulations, he was required to consider each record lot in isolation. To determine whether the proposed use of the property was a matter of right or whether it required special exception approval, the Zoning Administrator should have evaluated the applications to determine whether the proposed use consisted of a series of small, independent group homes that coincidentally happened to be located side by side, or whether the proposed use was a single facility with all the operational characteristics of a single, larger group home. For example, with respect to Girls and Boys Town Sargent Road facility, the Zoning Administrator considered the ownership and operation of four youth residential care home building units on a single lot, each providing housing and care for six children, in evaluating the necessary zoning relief. Ex. 30(a) (Vol. 1 of Appellants pre-hearing submission, ex. 4). It is thus not unduly burdensome for the Zoning Administrator to request a building permit applicant to provide information concerning the nature of the proposed use of any given lot and any adjacent lots. The Zoning Administrator is authorized to request from applicants "information necessary to determine compliance" with the Zoning Regulations, 11 DCMR § 3202.2, and should have done so in this case to obtain a complete understanding of the proposed use.

The Comprehensive Plan Issue

The Appellants assert that the Zoning Administrator erred in failing to consider the Comprehensive Plan as part of his permit review, and that if he had done so, he would have been alerted to the fact that the policies and objectives of the Comprehensive Plan with respect to community-based residential facilities focus on "facilities," not on "buildings." The Comprehensive Plan, in 10 DCMR § 112.6(d), requires the Zoning Administrator "In issuing or processing any building or construction permit [to] evaluate the proposal in conjunction with the applicable sections of the Comprehensive Plan and the Comprehensive Plan Maps." The Board concludes that the Zoning Administrator failed to comply with this requirement. However, the Comprehensive Plan is distinct from the Zoning Regulations. Any errors made with respect to the Comprehensive Plan in this case are beyond the jurisdiction of the Board of Zoning Adjustment.

The Girls and Boys Town Phase I Project Constitutes One Community-Based Residential Facility

Turning to the question of whether the Girls and Boys Town project should be considered as four, separate matter-of-right facilities or as one facility requiring special exception approval, the Board concludes that the project should be considered as one youth residential care home with four building units, housing a total of 24 children. While each group home has some characteristics that would support treating it as a separate facility, the facts of this case, viewed in light of the policies and objectives of the community-based residential facility regulations, tip the scales in favor of treating the four group homes as one facility that extends across four lots of record.

Girls and Boys Town applied for all four permits simultaneously, submitting a site plan to DCRA that indicated the relationship between the four lots of record and the buildings to be constructed on them. The Zoning Administrator reviewed and approved all four permits together. DCRA subsequently issued all four permits simultaneously. Girls and Boys Town undertook the construction of all four buildings simultaneously, with the same general contractor, as part of one overall construction project.

The plans show all four lots surrounded by a fence, with controlled access to the rear of the lots through a gated, private driveway that runs along the rear lot line of each lot. More importantly, however, the four group homes are part of one overall organization, program, and services to provide "safe, hygienic, and sheltered living arrangements" for 24 children. All four group homes will be occupied and operated simultaneously by the same owner/operator, with resident and other staff hired, compensated, trained, and supervised by the same owner/operator. Citing *National Black Child Development Institute v. District of Columbia Board of Zoning Adjustment,* 483 A.2d 687 (D.C. 1984), Girls and Boys Town argues that consideration of ownership of the facility would undermine the principle of land use law that zoning restrictions run with the land. Girls and Boys Town misses the point. The ownership of the property is relevant to the

administration and operation of the program, which in turn is relevant to the consideration of whether the program and services to be provided on the four record lots are properly characterized as one use or four separate uses.

Girls and Boys Town will provide shared administrative services and oversight, including regulatory and licensing compliance oversight for all four group homes, and will monitor the group homes for compliance with Girls and Boys Town own internal standards of operation. Girls and Boys Town will assign one social worker for each two homes. Girls and Boys Town will pay the repair costs and utility bills for each group home, and provide each home with a van and arrange for any necessary automotive repair services. Girls and Boys Town will provide a common recreational area for the children, including a half-court basketball and a large playing field, on one of the adjacent lots that it owns (on the campus), and arrange special events that will be attended by all 24 children. Girls and Boys Town's characterization of the project on its site plan as "Phase I" of the "D.C. Pennsylvania Avenue Campus" and in its community outreach materials as the "long-term residence" that will provide care for "24 children" reflects the simple reality that the project consists of one community-based residential facility.

Girls and Boys Town argues that if a private developer could have legally subdivided the parcel into four adjacent lots and constructed single-family dwellings on them for sale to the general public, then Girls and Boys Town must be permitted to construct and operate the four group homes for six children each as a matter of right. The four buildings shown on the site plans, however, do not have the characteristics of one-family dwellings. For example, three of the buildings are to be constructed with a lot line wall on the side lot line. A one-family detached dwelling in the C-2 District, however, must have two side yards; and the lot line wall of a one-family semi-detached dwelling must consist of a common division wall. *See* 11 DCMR §§ 405.1, 405.2, 405.3, 405.9, 775.2, 775.3. Since other types of buildings in the C-2 District are not required to have side yards, *see* § 775.5, the fact that three of the Girls and Boys Town buildings lack one side yard does not bear on the question of whether there are one or four facilities, but only that the buildings do not exhibit the same pattern and appearance required by the zone plan for one-family dwellings.

Another difference between one-family dwellings and the Girls and Boys Town buildings relates to the parking space requirements of the zoning regulations. Under the schedule of required parking spaces in § 2101.1, a one-family dwelling must have one parking space. A community-based residential facility for one to eight persons must also have one parking space, while the parking space requirements for facilities for 16 or more persons in the C-2 District are determined by the Board of Zoning Adjustment in a special exception proceeding. The Zoning Regulations provide in § 2116.1 that all parking spaces shall be provided on the same lot with the buildings they are intended to serve. The site plans show that Girls and Boys Town is actually providing nine parallel parking spaces along the rear of the four lots, with two of the parking spaces each overlapping lot lines and located on two lots. In addition, the architect's written description of the project indicates that additional parking will be provided for the group homes along the remainder of the driveway to be constructed in the future. None of the lots have access to their required parking spaces from a public street or alley, or from a private driveway under the ownership or control of the particular lot. *See* 11 DCMR § 2117.4. Taking into account the number of parking spaces to be provided and their location and access, the Girls and Boys Town

parking plan is not comparable to that which would be provided for four one-family dwellings or for four independently operated group homes. The parking plan thus tends to indicate that the four group homes are one community-based residential facility.

The characteristics described above support the Board's conclusion that the project consists of one community-based residential facility, a youth residential care home with four building units, to be occupied by 24 children. The zoning regulations therefore require special exception review to assure that facility will provide adequate off-street parking and that it can be operated without "an adverse impact on the neighborhood because of traffic, noise, operations, or the number of similar facilities in the area," and to address any similar cumulative impacts that might result from having more than one community-based residential facility in a square or within 500 feet of the subject facility. 11 DCMR §§ 358.4, 358.6, 358.7, 732.1(a); *see also* § 3104.1 (a special exception must be in harmony with the zone plan and not adversely affect adjacent and neighboring properties).

Girls and Boys Town argues that Zoning Commission (Z.C.) Order No. 725 compels a different result, in that the Zoning Commission specifically amended 11 DCMR § 201.1(n)(1) to permit youth residential care homes with six or fewer youth residents as a matter-of-right. Nowhere does Z.C. Order No. 725 sanction the artificial division of a community-based residential facility with a large population into small facilities with six or fewer residents to evade special exception review. For example, the Zoning Commission stated on page 7 of Z.C. Order No. 725 that "The Commission believes that increasing the matter-of-right CBRF residents to eight may be discriminatory, because others who are not related by blood, marriage or adoption; and who want to lawfully establish a family household would be limited to six persons, pursuant to the zoning definition of family." As discussed above, the Girls and Boys Town group homes do not have the same characteristics as one-family dwellings in the C-2 District. Moreover, they will not be operated in isolation from one another, but as part of one overall program of providing foster care for 24 children. As recognized by the Appellants' zoning expert, Kirk White, the requirement for special exception review when the number of residents exceeds the specified occupancy limits remains a legitimate, non-discriminatory aspect of the community-based residential facility regulations. The required Board of Zoning Adjustment review and public hearing process should take place in order to ensure that the facility is in harmony with the zone plan and does not adversely affect the neighborhood or the use and enjoyment of adjacent and neighboring properties.

Retroactive Versus Prospective Application of this Decision

In light of the Board's decision involving Girls and Boys Town's Sargent Road facility, the Board requested the parties to address whether the Board was free to disavow the statements it had made in its Decision and Order regarding the consequences of the hypothetical subdivision of the property into four lots, each with a matter-of-right youth residential care home; and if it did so, whether it should apply any new interpretation in this case or prospectively only. It is clear that "the Board is of course not bound for all time by its prior positions . . . ." *Smith v. District of Columbia Bd. of Zoning Adjustment,* 342 A.2d 356, 359 (D.C. 1975). Whether the

Board should apply its decision in the instant case prospectively only is somewhat more complex.

The Court of Appeals has outlined a number of factors to be considered in determining whether to apply a new rule of law retroactively in a pending case or prospectively only, including:

(1) The extent of reliance by the parties on the previous rule;

(2) The need to avoid any alteration of property or contract rights;

(3) The policy of rewarding plaintiffs who seek to initiate just changes in the law; and

(4) The desire to avoid unduly burdening the administration of justice with retroactive changes in the law.

French v. District of Columbia Bd. of Zoning Adjustment, 658 A.2d 1023, 1031 (D.C. 1995). Any reliance must be reasonable to avoid retroactive application of the new interpretation. *Id.*

The Board concludes first that Girls and Boys Town could not have reasonably relied upon the Board's statements in the Sargent Road decision. The statements addressed a hypothetical situation, and were not supported by an analysis of the Zoning Regulations. Girls and Boys Town did not supply the Board with any evidence to support its asserted reliance on the Sargent Road decision in entering into the Phase I construction contracts and beginning construction on the Pennsylvania Avenue campus. Within six days after the issuance of the Phase I building permits, SCSD filed the instant appeal, placing squarely at issue the hypothetical situation mentioned in the Sargent Road order. SCSD's opposition, along with that of ANC 6B, has been unrelenting ever since. In *Interdonato v. District of Columbia Board of Zoning Adjustment,* 429 A.2d 1000, 1004 (D.C. 1981), the Court recognized that a developer's decision to proceed with an investment in the face of substantial neighborhood opposition during Board of Zoning Adjustment and Court of Appeals proceedings could not be characterized as reasonable reliance upon an earlier Board decision in the same case. The Board similarly concludes that Girls and Boys Town was not entitled to rely upon its own assumptions that the Board's decision would be favorable to it.

Second, to the extent that there are property or contract interests at stake in this case, Girls and Boys Town may protect those interests by applying for special exception approval to use the property as a youth residential care home or by dedicating the property to a matter-of-right use.

Third, prospective application of this decision would undermine the policy of rewarding citizens who seek to initiate just changes in the interpretation of the Zoning Regulations.

Fourth, the administrative system will not be unduly burdened by the application of this interpretation to the instant case. This decision does not affect in any way the Sargent Road order, or any pending case.

The Board concludes therefore that its interpretation of the regulations in this decision and order should be applied to the Phase I project, such that Girls and Boys Town must apply for and obtain special exception approval to use the four record lots as proposed. In light of the important public policy issues raised in this case, Girls and Boys Town may submit a special exception application to the Board without prejudice to any position Girls and Boys Town may wish to take in any appeal of this Decision and Order.

For the reasons stated above, it is hereby **ORDERED** that the appeal is **GRANTED** and that the decision of the Zoning Administrator to approve Building Permit Nos. B438335, B438336, B438337, and B438338 is **REVERSED.**

VOTE: 4 – 0 – 1 (David W. Levy, Anne M. Renshaw, Curtis L. Etherly, Jr., and James H. Hannaham, to grant the appeal; Geoffrey H. Griffis abstaining).

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

Each concurring member has approved the issuance of this Decision and Order.

ATTESTED: **JERRILY R. KRESS, FAIA**
Director, Office of Zoning

FINAL DATE OF ORDER: JUN 2 1 2002

PURSUANT TO 11 DCMR § 3125.6, THIS DECISION AND ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.
MS/rsn

APPENDIX A – PRINCIPAL ZONING REGULATIONS RELIED UPON

101 INTERPRETATION AND APPLICATION

101.6 Where a lot is divided, the division shall be effected in a manner that will not violate the provisions of this title for yards, courts, other open space, minimum lot width, minimum lot area, floor area ratio, percentage of lot occupancy, parking spaces, or loading berths applicable to that lot or any lot created.

199 DEFINITIONS

199.1 When used in this title, the following terms and phrases shall have the meanings ascribed:

. . . .

Building - a structure having a roof supported by columns or walls for the shelter, support, or enclosure of persons, animals, or chattel. When separated from the ground up or from the lowest floor up, each portion shall be deemed a separate building, except as provided elsewhere in this title. The existence of communication between separate portions of a structure below the main floor shall not be construed as making the structure one (1) building.

. . . .

Community-based residential facility - a residential facility for persons who have a common need for treatment, rehabilitation, assistance, or supervision in their daily living. This definition includes, but is not limited to, facilities covered by D.C. Law 2-35, the Community Residence Facilities Licensure Act of 1977, and facilities formerly known as convalescent or nursing home, residential halfway house or social service center, philanthropic or eleemosynary institution, and personal care home.

If an establishment is a community-based residential facility as defined in this section, it shall not be deemed to constitute any other use permitted under the authority of these regulations. A community-based residential facility may include separate living quarters for resident supervisors and their families. All community-based residential facilities shall be included in one (1) or more of the following subcategories:

(a) **Adult rehabilitation home** – a facility providing residential care for one (1) or more individuals sixteen (16) years of age or older who are charged by the United States Attorney with a felony offense, or any individual twenty-one (21) years of age or older, under pre-trial detention or sentenced court orders;

(b) **Community residence facility** – a facility that meets the definition for and is licensed as a community residence facility under the Health Care Facilities and Community Residence Facilities Regulations, 22 DCMR § 3099.1, as that definition may be amended from time to time;

(c) **Emergency shelter** – a facility providing temporary housing for one (1) or more individuals who are otherwise homeless and who are not in need of a long-term sheltered living arrangement, as that arrangement is defined in the Health Care Facilities and Community Residence Regulations, 22 DCMR § 3099.1;

(d) **Health care facility** – a facility that meets the definition for and is licensed as a skilled care facility or intermediate nursing care facility under the Health Care Facilities and Community Residence Regulations, 22 DCMR § 3099.1, as those definitions may be amended from time to time;

(e) **Substance abusers home** – a community residence facility that offers a sheltered living arrangement, as that arrangement is defined in the Health Care Facilities and Community Residence Facilities Regulations of the District of Columbia, 22 DCMR § 3099.1, for one (1) or more individuals diagnosed by a medical doctor as abusers of alcohol, drugs, or other controlled substances;

(f) **Youth rehabilitation home** – a facility providing residential care for one (1) or more individuals less than twenty-one (21) years of age who have been detained or committed by a court pursuant to their involvement in the commission of an act designated as an offense under the law of the District of Columbia, or of a state if the act occurred in a state, or under federal law. The facility shall not house persons sixteen (16) years of age or older who are charged by the United States Attorney with a felony offense;

(g) **Youth residential care home** – a facility providing safe, hygienic, sheltered living arrangements for one (1) or more individuals less than eighteen (18) years of age, not related by blood, adoption, or marriage to the operator of the facility, who are ambulatory and able to perform the activities of daily living with minimal assistance.

. . . .

Family – one (1) or more persons related by blood, marriage, or adoption, or not more than six (6) persons who are not so related, including foster children, living together as a single housekeeping unit, using certain rooms and housekeeping facilities in common; Provided, that the term family shall include a religious community having not more than fifteen (15) members.

. . . .

Lot - the land bounded by definite lines, when occupied or to be occupied by a building or structure and accessory buildings, includes the open spaces required under this title. A lot may or may not be the land so recorded on the records of the Surveyor of the District of Columbia.

. . . .

Lot of record – a lot recorded on the records of the Surveyor of the District of Columbia.

199.2 For the purpose of this title, the following definitions shall not be held to modify or affect in any way the legal interpretations of these terms or words when used in other regulations:

. . . .

(c) The word "lot" shall include the word "plot" and "parcel";

. . . .

(g) Words not defined in this section shall have the meanings given in *Webster's Unabridged Dictionary*.

201 USES AS A MATTER OF RIGHT (R-1)

201.1 The following uses shall be permitted as a matter of right in R-1 Residence Districts:

(n) Certain Community-Based Residential Facilities, as limited by the following:

(1) Youth residential care home, community residence facility, or health care facility for not more than six (6) persons, not including resident supervisors or staff and their families; or for not more than eight (8) persons, including resident supervisors or staff and their families; Provided, that the number of persons being cared for shall not exceed six (6).

300 R-2 DISTRICTS: GENERAL PROVISIONS

300.3 The following uses shall be permitted as a matter of right in R-2 Districts:

(a) Any use permitted in R-1 Districts under § 201 of chapter 2 of this title.

320 R-3 DISTRICTS: GENERAL PROVISIONS

320.3 The following uses shall be permitted as a matter of right in an R-3 District:

(a) Any use permitted in an R-2 District under § 300.3.

330 R-4 DISTRICTS: GENERAL PROVISIONS

330.5 The following uses shall be permitted as a matter of right in an R-4 District:

(a) Any use permitted in R-3 Districts under § 320.3 of this chapter.

350 R-5 DISTRICTS: GENERAL PROVISIONS

350.4 The following uses shall be permitted as a matter of right in an R-5 District:

(a) Any use permitted in the R-4 District . . . .

358 YOUTH [RESIDENTIAL] CARE HOMES AND COMMUNITY RESIDENCE FACILITIES (R-5)

358.1 Youth residential care home or community residence facility for sixteen (16) to twenty-five (25) persons, not including resident supervisors or staff and their families, shall be permitted in an R-5 District if approved by the Board of Zoning Adjustment in accordance with the conditions specified in § 3108.1 [renumbered § 3104.1] of chapter 31 of this title, subject to the provisions of this section.

358.2 There shall be no other property containing a community-based residential facility for seven (7) or more persons in the same square.

358.3 There shall be no other property containing a community-based residential facility for seven (7) or more persons within a radius of five hundred feet (500 ft.) from any portion of the subject property.

358.4 There shall be adequate, appropriately located, and screened off-street parking to provide for the needs of occupants, employees, and visitors to the facility.

358.5 The proposed facility shall meet all applicable code and licensing requirements.

358.6 The facility shall not have an adverse impact on the neighborhood because of traffic, noise, operations, or the number of similar facilities in the area.

358.7 The Board may approve more than one (1) community-based residential facility in a square or within five hundred feet (500 ft.) only when the Board finds that the cumulative effect of the facilities will not have an adverse impact on the neighborhood because of traffic, noise, or operations.

358.8 The Board may approve a facility for more than twenty-five (25) persons, not including resident supervisors or staff and their families, only if the Board finds that the program goals and objectives of the District of Columbia cannot be

achieved by a facility of a smaller size at the subject location and if there is no other reasonable alternative to meet the program needs of that area of the District.

358.9 The Board shall submit the application to the Director of the Office of Planning for coordination, review, report, and impact assessment along with reports in writing of all relevant District departments and agencies, including but not limited to the D.C. Departments of Public Works, Human Services, and Corrections, and, if a historic district or historic landmark is involved, of the State Historic Preservation Officer.

501 USES AS A MATTER OF RIGHT (SP)

501.1 The following uses shall be permitted as a matter of right in an SP District:

(a) Any use permitted in any R-5 District under §§ 350.4 and 350.5, except a hotel.

701 USES AS A MATTER OF RIGHT (C-1)

701.2 Any use permitted in any R-5 District under §§ 350.4 and 350.5, or in the SP District under § 501, except a community-based residential facility for seven (7) or more persons not including resident supervisors or staff and their families, shall be permitted in a C-1 District as a matter of right.

701.3 A youth residential care home, community residence facility, or health care facility for seven (7) to eight (8) persons, not including resident supervisors or staff and their families, shall be permitted in a C-1 District as a matter of right; Provided, that there shall be no property containing an existing community-based residential facility for seven (7) or more persons in the same square and that there shall be no property containing an existing community-based residential facility for seven (7) or more persons within a radius of five hundred feet (500 ft.) from any portion of the subject property.

721 USES AS A MATTER OF RIGHT (C-2)

721.1 Any use permitted in C-1 Districts under § 701 of this chapter shall be permitted in a C-2 District as a matter of right.

. . . .

721.5 A youth residential care home, community residence facility, or health care facility for seven (7) to fifteen (15) persons, not including resident supervisors or staff and their families, shall be permitted in a C-2 District as a matter of right;

Provided, that there shall be no property containing an existing community-based residential facility for seven (7) or more persons in the same square and that there shall be no property containing an existing community-based residential facility for seven (7) or more persons within a radius of five hundred feet (500 ft.) from any portion of the subject property.

724 USES SUBJECT TO BZA APPROVAL: GENERAL (C-2)

724.1 The uses specified in §§ 726 through 733 shall be permitted in a C-2 District if approved by the Board of Zoning Adjustment in accordance with the conditions specified in § 3108 [renumbered § 3104] of chapter 31 of this title.

732 COMMUNITY-BASED RESIDENTIAL FACILITIES (C-2)

732.1 Community-based residential facilities in the following subcategories shall be permitted in a C-2 District if approved by the Board of Zoning Adjustment, in accordance with the conditions specified in § 3108 [renumbered § 3104] of chapter 31 of this title:

(a) Youth residential care home or community residence facility for sixteen (16) to twenty-five (25) persons, not including resident supervisors or staff and their families, subject to the standards and requirements of § 358 of chapter 3 of this title.

3104 SPECIAL EXCEPTIONS

3104.1 Pursuant to authority contained in the Zoning Act, the Board is authorized to grant special exceptions, as provided in this Title, where, in the judgment of the Board, those special exceptions will be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps and will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Zoning Maps, subject in each case to the special conditions specified in [the Zoning Regulations].

3202 BUILDING PERMITS

3202.2 To determine compliance with the provisions of this title, each application for a building permit shall be accompanied by any of the following that is deemed necessary:

(a) Scaled drawings showing the following:

(1) The exact shape, topography, and dimensions of the lot to be built upon;

(2) The plan, elevation, and location by dimensions of all existing and proposed structures, and the proposed uses of those structures;

(3) The parking and loading plans and the basis for computation of those plans; and

(4) Other information necessary to determine compliance with these regulations; and

(b) An official building plat, in duplicate, prepared by the Surveyor of the District of Columbia, upon which the applicant shall indicate in ink and to the same scale dimensions of the following:

(1) All existing and proposed structures;

(2) The number, size, and shape of all open parking spaces, open loading berths, and approaches to all parking and loading facilities; and

(3) Other information necessary to determine compliance with the provisions of this title.

3202.3 Except as provided in § 2516 (relating to building lot control in Residence Districts) and the Act of Congress of June 28, 1898 (30 Stat. 520, chapter 519, § 5), a building permit shall not be issued for the proposed erection, construction, or conversion of any principal structure, or for any addition to any addition to any principal structure, unless the land for the proposed erection, construction, or conversion has been divided so that each structure will be on a separate lot of record; except buildings and structures related to a fixed right-of-way mass transit system approved by the Council of the District of Columbia. Any combination of commercial occupancies separated in their entirety, erected, or maintained in a single ownership shall be considered as one (1) structure.

3203.1 Except as provided in §§ 3203.1, 3203.8, or 3203.9, no person shall use any structure, land, or part of any structure or land for any purpose other than a one-family dwelling until a certificate of occupancy has been issued to that person stating that the use complies with this title and the provisions of the D.C. Building Code (Title 12 DCMR).

APPENDIX B – EVIDENTIARY RULINGS

A. Girls and Boys Town Motion to Strike

Girls and Boys Town filed a written motion on November 29, 2001, to strike certain of the SCSD pre-hearing submissions and to suppress certain anticipated testimony as irrelevant. Ex. 33. The District of Columbia Administrative Procedure Act requires the exclusion of "irrelevant, immaterial, and unduly repetitious evidence." D.C. Code § 2-509(b) (2001). After reviewing the motion and the opposition thereto, the Board granted the motion in part and denied the motion in part.

The Board ordered the following evidence suppressed:

(1) Evidence relating to any future development of Boys Town, whether actually planned or simply speculated on by the Appellant: The Board suppressed all speculative testimony, but deferred ruling on planned future development. Tr. at 49-50 (Dec. 4, 2001). As the parties did not present any material evidence concerning actual planned future development, the Board did not find it necessary to rule on Girls and Boys Town's request to suppress such testimony.

(2) Evidence relating to Boys Town pending lawsuit involving the subject properties: The Board suppressed all testimony involving the lawsuit, since it was not the type of information that would be considered by the Zoning Administrator in approving the issuance of the permit. Tr. at 50-51 (Dec. 4, 2001).

(3) The Ward 6 Plan and other community planning efforts: The Board allowed evidence regarding the Comprehensive Plan and the Ward 6 Plan since the Comprehensive Plan Amendment Act of 1999, 10 DCMR § 112.6(c), directs the Zoning Administrator and the Board of Zoning Adjustment to consider the applicable sections of the Comprehensive Plan in evaluating the issuance of any building permit, but suppressed all other evidence relating to community planning efforts. Tr. at 51-57 (Dec. 4, 2001).

(4) Information on the selling price for nearby homes: The Board suppressed all such evidence since it is not relevant to the issue on appeal, which is whether the Zoning Administrator erred in the administration and interpretation of the Zoning Regulations in determining that the four building permits could be issued as a matter of right rather than requiring special exception approval. Tr. at 57 (Dec. 4, 2001).

(5) Boys Town's Finances: The Board suppressed all such evidence since it is not relevant to the issue on appeal. Tr. at 57 (Dec. 4, 2001).

(6) The number of community-based residential facilities in Ward 6: At the December 4, 2001, public hearing, the Board deferred ruling on this aspect of the motion to suppress. Tr. at 57-58. None of the parties presented material evidence regarding the number of CBRFs in Ward 6, therefore the Board found it unnecessary to rule on this request.

(7) All references to Phase II of the project: At the December 4, 2001, public hearing, the Board deferred ruling on this aspect of the motion to suppress. Tr. at 59. None of the parties presented material evidence regarding Phase II, therefore the Board found it unnecessary to rule on this request.

(8) All references to Boys Town's Sargent Road site: The Board suppressed all such evidence, with the exception of the Board of Zoning Adjustment's Decision and Order relating to the site and the Zoning Administrator's memorandum relating to the zoning relief required for the site. Tr. at 59-64 (Dec. 4, 2001).

(9) Any testimony not germane to the appeal. The Board suppressed such testimony as irrelevant. Tr. at 64 (Dec. 4, 2001).

(10) Testimony regarding other social services in the District, such as city jails and the D.C. Hospital: The Board suppressed such testimony as irrelevant. Tr. at 64 (Dec. 4, 2001).

(11) State of the real estate market in the surrounding area: The Board suppressed such evidence as irrelevant. Tr. at 64 (Dec. 4, 2001).

(12) Speculation on Boys Town future plans: The Board suppressed all speculative testimony. Tr. at 65 (Dec. 4, 2001).

(13) The Comprehensive Plan: In light of 10 DCMR § 112.6(c), the Board allowed the parties to submit evidence regarding the applicable sections of the Comprehensive Plan. Tr. at 65 (Dec. 4, 2001).

(14) The central operations of Boys Town: At the December 4, 2001, hearing, the Board deferred ruling on the motion. Tr. at 65-66. Girls and Boys Town subsequently presented limited testimony regarding its operations, which the Board allowed.

(15) Boys Town's alleged lack of communication with community groups. The Board suppressed all such testimony as irrelevant to the determination of whether the Zoning Administrator erred in the administration and interpretation of the Zoning Regulations. Tr. at 66-67 (Dec. 4, 2001).

(16) The likelihood of expansion of the project: The Board suppressed any such testimony that would be speculative in nature. Tr. at 67 (Dec. 4, 2001).

(17) Economic development in the area: The Board suppressed such testimony as irrelevant to the question of whether the Zoning Administrator erred in the administration and interpretation of the Zoning Regulations. Tr. at 67-69 (Dec. 4, 2001).

(18) Other impacts on zoning and planning goals: At the December 4, 2001, hearing, the Board deferred ruling on the admissibility of such evidence. Tr. at 69. Ultimately, none of the parties presented such evidence and a ruling was not required.

The Board's ordered the following documents, contained in the Appellants' pre-hearing submissions (Exhibit 30), stricken:

(1) Volume 1, ex. 3, Ward 6 Plan: In light of 10 DCMR § 112.6(c), the motion to strike is denied. Tr. at 70 (Dec. 4, 2001).

(2) Volume 1, ex. 3, Draft Strategic Plan and Budget for 2000-2001: the motion to strike is granted as these materials are not relevant to the determination of whether the Zoning Administrator erred in applying or interpreting the Zoning Regulations. Tr. at 70-71 (Dec. 4, 2001).

(3) Volume 1, ex. 3, OP Memorandum dated March 30, 2001, regarding Committees and Assignments for May 2nd Planning Task Force: The motion to strike is granted as these materials are not relevant. Tr. at 71 (Dec. 4, 2001).

(4) Volume 1, ex. 3, Court Services and Offender Supervision Agency Fact Sheet: On December 4, the Board deferred ruling on the admissibility of this submission. Tr. at 71-72. The motion to strike is granted as the fact sheet is not relevant to the issue on appeal.

(5) Volume 1, ex. 3, Map of CBRFs located near Square 1045: On December 4, the Board deferred ruling on the admissibility of this submission. Tr. at 72. The motion to strike is hereby granted as the map is not relevant to the issue on appeal.

(6) Volume 1, ex. 3, D.C. Health Care, Inc., letter dated June 26, 2001: On December 4, the Board deferred ruling on the admissibility of this submission. Tr. at 72-73. The motion to strike is granted since the existence of D.C. Health Care, Inc., is not germane to the question of whether the project consists of four facilities or one facility. Exhibit 5 in the BZA case file, an identical copy of the letter, is also stricken.

(7) Volume 1, ex. 4, Materials relating to Girls and Boys Town Sargent Road facility from BZA Application No. 16531: The Board denied the motion to strike with respect to the Zoning Administrator's memorandum dated April 10, 2000, as this memorandum is relevant to the question of whether the four youth residential care homes are permitted as a matter of right. Tr. at 84-85 (Dec. 4, 2001). At the December 4, 2001, hearing, the Board deferred ruling on the admissibility of the public hearing notice concerning the Sargent Road facility. The motion to strike is granted with respect to that document, as it is irrelevant to the issue on appeal. All other documents contained in Volume 1, exhibit 4, are stricken as irrelevant to the issue on appeal. Tr. at 73-85 (Dec. 4, 2001).

(8) Volume 1, ex. 5, information on foster care rates, federal payment for Boys Town operations, and District of Columbia contracts for foster care services: All documents are stricken as irrelevant. Tr. at 85-88 (Dec. 4, 2001).

(9) Volume 2, ex. 6, newspaper clippings: All documents are stricken as irrelevant. Tr. at 88 (Dec. 4, 2001).

(10) Volume 2, ex. 7, comments on the environmental assessment and impact analysis. These documents are stricken as irrelevant, as there was no indication that the Zoning Administrator considered them in making his decision. Tr. at 88-93 (Dec. 4, 2001).

(11) Volume 2, ex. 8, environmental assessment report: The Board admitted the environmental assessment into evidence since it contains Girls and Boys Town's narrative description of the project. Tr. at 93-101 (Dec. 4, 2001).

(12) Volume 3, ex. 10, Girls and Boys Town lawsuit: The Board ordered this exhibit stricken as irrelevant to the issue on appeal. Tr. at 102 (Dec. 4, 2001).

B. SCSD's Objection to Evidence and Arguments Relating to Fair Housing Act Issues

In its opposition dated December 4, 2001, to Girls and Boys Town Motion to Strike, SCSD objected to Girls and Boys Town's arguments and evidence relating to the requirements of the Fair Housing Act. The Board ordered such testimony and arguments suppressed as irrelevant, since there is no evidence that Girls and Boys Town has as sought "reasonable accommodation" under District of Columbia regulations implementing the Fair Housing Act.[4] The Board also ordered attachment F in Exhibit 32, Girls and Boys Town' pre-hearing statement, a copy of the stipulated agreement between the United States and the District of Columbia regarding Fair Housing Act requirements, stricken from the record as irrelevant. Tr. at 69, 102 (Dec. 4, 2001).

C. Girls and Boys Town Objection to Neighborhood Petition

During the hearing on February 19, 2002, Girls and Boys Town objected to the inclusion in the record of Exhibit 9 in Volume 1 of SCSD's pre-hearing submission (BZA Ex. 30(c)), a petition signed by numerous Capitol Hill residents opposing Girls and Boys Town's plans to build a "residential-type group care complex for youth" in the 1300 block of Pennsylvania Avenue, S.E., and/or the 1300 block of Potomac Avenue, S.E. The Board deferred ruling on whether the petition should be stricken. Tr. at 319-20 (Feb. 19, 2002).

In an appeal, the Board must decide whether the Zoning Administrator erred in the interpretation or administration of the Zoning Regulations. D.C. Code § 6-641.07(g)(1) (2001). The existence of neighborhood opposition or support for a particular project does not provide a sound basis for the determination of whether to grant or deny an appeal. See, e.g., *Dietrich v. District of Columbia Board of Zoning Adjustment*, 320 A.2d 282, 285 (D.C. 1974), in which the Court approved the Board's explanation that its decisions to grant or deny a special exception "must not be controlled by a head count as in a political election. Rather, its decision is controlled by the evidence adduced as it relates to the requirements for a special exception." The neighborhood petition is therefore stricken.

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[4] The Department of Consumer and Regulatory Affairs Procedures Regarding Requests for Reasonable Accommodation Under the Fair Housing Act are set out in 14 DCMR § 111, 45 DCR 8057 (1998).

D. Appellants' Objection to Girls and Boys Town Exhibit Consisting of Package of Community Outreach Materials

At the February 19, 2002, public hearing, Girls and Boys Town sought to introduce into evidence a package of various community outreach materials. The Board admitted into evidence that portion of the package consisting of community updates, BZA Exhibit 50, since these updates contain information relating to Girls and Boys Town characterization of the project. The Board did not accept into evidence the remainder of the package, as it consisted of public relations materials that are not germane to the issue on appeal. Tr. at 362-66, 380, 400-06 (Feb. 19, 2002).

E. Appellants' Objection to Girls and Boys Town Exhibit Consisting of Newspaper Articles Relating to the Child Welfare System

At the February 19, 2002, public hearing, Girls and Boys Town offered into evidence a series of newspaper articles dated 2001 relating to the state of the foster care system in the District of Columbia. Neither the Zoning Commission, in approving Zoning Commission Order No. 725 in 1992, nor the Zoning Administrator, in reviewing the building permit applications in question, would have considered the articles in the course of making their decisions. The Board therefore sustained the Appellants' objection that the articles are irrelevant to the issues on appeal. Tr. at 233-34, 316-19 (Feb. 19, 2002).

F. BZA Exhibit 48: Letter from Van Hale

Exhibit 48 consists of a letter to the Board from Van Hale dated February 13, 2002. Since the Board's Rules of Practice and Procedure do not provide for public comment in appeal cases, *see* 11 DCMR § 3177.11(a), Exhibit 48 is stricken from the record.

G. BZA Exhibit 59: Testimony of Lawrence P. Goodwin and E. Douglas Shadd; Letter from Kalimah Abdul Sabur

Exhibit 59 consists of written testimony from Lawrence P. Goodwin dated February 19, 2002, and E. Douglas Shadd, dated February 12, 2002, along with a letter from ANC Single-Member District Commissioner Kalimah Abdul Sabur dated February 12, 2002. None of the parties to this appeal presented these documents as part of their case. The Board's Rules of Practice and Procedure do not provide for public comment in appeal cases. *See* 11 DCMR § 3177.11(a). Therefore, Exhibit 59 is stricken from the record.

APPENDIX C – CORRECTIONS TO 05/07/02 TRANSCRIPT

The Board orders the transcript of the May 7, 2002, decision meeting on this case corrected as follows:

Page 3, Lines 10 and 11: Change NC-6B to ANC 6B in two places.

Page 3, Line 19: Change Zone Administrator to Zoning Administrator.

Page 3, Line 21: Add the words "in a" so that the sentence begins "It is in a C-2-A District . . . ."

Page 3, Line 23: Delete the words "is and added."

Page 4, Line 2: Change proprietary to prior.

Page 5, Line 9: Change CBRS to CBRFs.

Page 5, Line 12: Change needed to needy.

Page 8, Line 17: Change sat to say.

Page 9, Line 4: After the word facility, add a comma and the word "there."

Page 16, Line 25: Change were to where.

Page 18, Line 9: Change phrase to phase.

Page 21, Line 21: Change Field to Feola.

Page 23, Lot 13: Change on to out.

Page 27, Line 1: Change Mr. Kudos to Mr. Bello.

Page 28, Line 25: Change secondary to seconder.

Page 29, Line 4: Add the word permits at the end of the line (the four different permits).

Page 30, Line 14: Change need to lead.

Page 33, Line 14: Change Thanks to Thank.

Page 34, Line 16: Add the word "that" before the phrase "I have difficulty with."

Page 35, Line 21: Add the word "not" so that the phrase reads "are not unknown."

Page 36, Line 5: Change implying to inclined.

Page 45, Line 4: Change an to and.

Page 49, Line 17: Add the word "not" in the phrase "that would not be the zoning regulations."

Page 50, Line 4: Change share to chair.

Page 50, Line 16: Change certifying to certificate of.

Page 51, Line 4: Change provision to proposition.

Page 51, Line 25: Change is to as.

Page 53, Line 7: Change mia to mea.

Page 55, Line 13: Change Sergeant's Row to Sargent Road.

Page 56, Line 2: Change Sergeant to Sargent.

Page 59, Line 22: Change issues to issued.

Page 61, Line 13: Change presidential to precedential.

Page 61, Line 18: Change presidential to precedential.

Page 62, Line 17: Add the word statement and correct the word Sergeant, to read "it was a very significant statement in the Sargent Road decision."

Page 62, Line 23: Change use to youth.

Page 64, Line 6: Change alliance to reliance.

Page 65, Line 9: Change work to look.

Page 68, Line 9: Change got to go.

Page 73, Line 5: Change vanilla to fundamental.

Page 73, Line 8: Change presidential to precedential.

Page 74, Line 1: Change rural to real.

Page 78, Line 4: Change Sergeant to Sargent.

Page 82, Lines 2 and 10: Change Sergeant to Sargent.

Page 85, Line 20: Change searing to searching.

Page 89, Line 22: Change alliance to reliance.

Page 92, Line 14: Change subsigent to substantive.

Page 98, Line 19: Change 350 to 358.

Page 100, Line 13: Change meant to mean.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

BZA APPEAL NO. 16791

As Director of the Office of Zoning, I hereby certify and attest that on JUN 2 1 2002, a copy of the foregoing Decision and Order in BZA Appeal No. 16791 was mailed first class, postage prepaid, to each party and public agency who appeared and participated in the public hearing and who is listed below:

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